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No. 1033

In the

Supreme Court of the United States

OCTOBER TERM, 1956

DEE BROWN WALKER AND ANN G. WALKER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DEE BROWN WALKER,
Pro Se,
Counsel for Petitioners,
904 Southland Life
Building,
Dallas 1, Texas.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dee Brown Walker and Ann G. Walker pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 5, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 15-17) is not reported and is printed in Appendix B hereto, infra, p. 17. The opinion of the Court of Appeals of the Fifth Circuit, printed in Appendix B hereto, infra, p. 18, is reported in *240 F. 2d 601.*

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957, R. 37; p. 21, infra. Rehearing was denied on March 9, 1957, R. 41. The jurisdiction of this Court is invoked under *28 U. S. C., Section 1254(1).*

QUESTION PRESENTED

Whether additions to income tax may be assessed by the United States of America when a taxpayer wilfully refuses to file a declaration of his estimated tax for the taxable year.

STATUTES INVOLVED

The statutory provisions involved are Chapter 120, Sec. 5(a), 57 Stat. 141; Chapter 210, Part I, Sec. 13(a), 58 Stat. 242; Chapter 453, Title I, Sec. 102(b)(4), 59 Stat. 559; Chapter 168, Title II, Sec. 202(a), 62 Stat. 113; Chapter 809, Title II, Sec. 208(d)(4), 64 Stat. 544; Chapter 994, Title II, Sec. 221(g), 64 Stat. 945, *26 U. S. C. A., Section 58;* and Chapter 120, Sec. 5(b), 57 Stat. 144; Chapter 63, Title I, Sec. 118(a), 58 Stat. 37; Chapter 210, Pt. I, Sec. 6(b), (8), 13(b), 58 Stat. 235, 244; Chapter 340, Sec. 4(b), 59 Stat. 523; Chapter 809, Title II, Sec. 208(d)(8), 64 Stat. 545; Chapter 1195, Sec. 2, 64 Stat. 1136; Title I, Sec. 103(b), 65 Stat. 465, *26 U. S. C. A., Section 294.* They are printed in Appendix A, infra, pp. 7-16.

STATEMENT

This is a suit by the Petitioners against the United States of America for refund of a penalty assessed against them for having wilfully failed to make a timely declaration of their estimated income tax. The cause was tried in the District Court by an agreed statement of facts as follows:

> "The parties hereto, by their respective counsel of record, agree that the following are the facts to be considered by the Court in connection with the above case.
>
> "During the taxable year January 1, 1952 to December 31, 1952, the plaintiffs failed to make a timely declaration of the estimated tax which they would pay for the taxable year 1952 and were assessed by the Internal Revenue Service the sum of $203.77 under the provisions of Title 26, Section 294(d)(1)(A) U. S. Code Anno. Plaintiffs failed to make a timely declaration through willful neglect. The agents of the Internal Revenue Service presented plaintiffs with waiver restrictions on assessment and collection of deficiency in tax and acceptance of over-assessment, a copy of which is attached hereto and marked 'Exhibit A' (R. 5). The plaintiffs paid such sum of $203.77 on February 1, 1955.
>
> "On February 28, 1955 the plaintiffs filed their claim for refund of $203.77, claiming that the statute upon which the penalty was based was unconstitutional and that the amount was illegally and wrongfully collected from the plaintiffs. A copy of such claim is attached hereto and marked 'Exhibit B' (R. 6). That such claim was filed for a period of over six months and has not been paid.
>
> "The plaintiffs received from the Internal Revenue Service a letter dated March 29, 1955. A copy of

said letter is attached hereto and marked 'Exhibit C' (R. 7)."

The Petitioners alleged that the statute on which the penalty was assessed was unconstitutional. The District Court denied the claim of Petitioners, R. 14, infra, p. 17. The Court of Appeals affirmed the judgment of the District Court, R. 37, infra, p. 27. Motion for rehearing was duly filed by Petitioners, R. 38, and denied by the Appellate Court, R. 41.

In the opinion of the Court of Appeals, this statement was made, infra: "Appellants do not attack directly the statutory requirement that estimated be filed * * *." In Petitioners' motion for rehearing they made their position clear that they attacked all statutes affecting this question, R. 39.

REASONS FOR GRANTING THE WRIT

1. The question presented here has never before been passed upon by this Court is therefore both in the Court of Appeals and in this Court one of first instance. The two statutes requiring an estimate to be filed and authorizing fines for failure to file, failure to estimate properly and failure to pay are repugnant to the Constitution of the United States and the lower Court held that they were valid.

2. Millions of taxpayers are affected by these statutes. It has been the consensus of opinion since these statutes were inacted that they were unconstitutional. The Government's agents have not dared to enforce these fines

until recently for that reason. It was obviously desired that a period of time elapse before any attempt would be made to enforce these statutes so that the argument could be made that no taxpayer had even thought they were unconstitutional. Fines are now being handed out to taxpayers all over the country but in general the amounts are small and a taxpayer cannot afford to appeal to the Courts. He must thereby resign himself to have his property taken from him without any trial whatever.

The cost of filing this suit in the District Court and on, including the filing of this petition, which cost includes court cost, appeal fees, bond fees, printing fees, and others has been between $425.00 and $500.00 without any fee paid to any lawyer for representation. Your Petitioner is an attorney at law and has represented himself all the way up. Millions of taxpayers who are not lawyers cannot afford this expensive procedure.

The 1954 Internal Revenue Act carries over the requirements to file and estimate, *26 U. S. C. A., Sec. 6015, C. 736, 68A Statutes 737*, and the requirement not to underestimate under penalty of fine, *26 U. S. C. A., Sec. 6654, C. 736, 68A Statutes 823* (individuals); *26 U. S. C. A., Sec. 6655 C. 736, 68A Statutes 825* (corporations). Also that act now requires that certain corporations file estimates, *26 U. S. C. A., Sec. 6016, C. 736, 68A Statutes 738.*

How can a statute be constitutional which fines one for not guessing right? One of the fundamental principles of government was that this was to be one of definite written laws and not of conjecture.

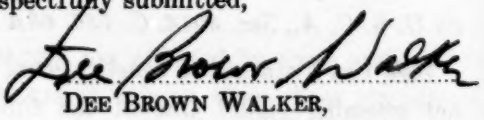
3. The holding in the lower Court is contrary to the case of *Helvering, Commissioner v. Mitchell (1938), 303 U. S. 391, 58 S. Ct. 630, 82 L. Ed. 917.* In the *Mitchell* case the fine was assessed on taxes already owed and not paid. It was not assessed for an act not performed as the instant statute authorizes. The *Mitchell* case did not hold that Congress through its taxing power had the right to pass any kind of law because it might affect the collecting of revenue.

4. In the Court of Appeals Petitioner and Mr. Warde H. Erwin, as amicus curiae, filed briefs which are certified and extra copies of both are filed in this Court. The opinion of the Court of Appeals stated that Petitioner did not cite any authority for his contention that the statute was unconstitutional. There is no authority to be cited since there has never before been an adjudication of this question. If these millions of individual taxpayers are to lose their property through this extra-judicial procedure, certainly the highest Court in this land ought to tell them so.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,



DEE BROWN WALKER,
Attorney Pro Se Et Ux.

May 10, 1957.

APPENDIX A

26 U. S. C. A. Sec. 58

Declaration of estimated tax by individuals

(a) *Requirement of declaration.* Every individual [other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable, but including every alien individual who is a resident of Puerto Rico during the entire taxable year] shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

(b) *Contents of declaration.* In the declaration required under subsection (a) the individual shall state—

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source and without regard to the tax imposed by subchapter E on self-employment income;

(2) the amount which he estimates as the credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

(c) *Joint declaration by husband and wife.* In the case of a husband and wife, a single declaration under this section may be made by them jointly, in which case the liability with respect to the estimated tax shall be joint and several. No joint declaration may be made if either the husband or wife is a nonresident alien. If a joint declaration is made but a joint return is not made for the taxable year, the estimated tax for such year may be treated as the estimated tax of either the husband or the wife, or may be divided between them.

(d) *Time and place for filing.*

(1) *In general.* The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

(2) *Amendment of declaration.* An individual may make amendments of a declaration filed during the taxable year under this subsection, under regulations prescribed by the Commissioner with the approval of the Secretary. If so made, such amendments may be filed on or before the fifteenth day of the last month of any quarter of the taxable year subsequent to that in which the declaration was filed and in which no previous amendment has been filed, except that in the case of an amendment filed after September 15 of the taxable year, it may be filed on or before January 15 of the succeeding taxable year. Declarations and amendments thereof shall be filed with the collector specified in section 53(b) (1).

(3) *Return as declaration or amendment.* If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the declaration permitted by paragraph (2) to be filed on or before such January 15.

(e) *Extension of time.* The Commissioner may grant a reasonable extension of the time for filing declarations and paying the estimated tax, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(f) *Persons under disability.* If the taxpayer is unable to make his own declaration, the declaration shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(g) *Signature presumed correct.* The fact that an individual's name is signed to a filed declaration shall be prima facie evidence for all purposes that the declaration was actually signed by him.

(h) *Publicity of declaration.* For the purposes of section 55 (relating to publicity of returns), a declaration of esti-

mated tax shall be held and considered a return under this chapter. June 9, 1943, 7 p. m., E. W. T., c. 120, § 5(a), 57 Stat. 141, amended May 29, 1944, 7 p. m., E. W. T., c. 210, Part I, § 13(a), 58 Stat. 242; Nov. 8, 1945, 5:17 p. m., E. S. T., c. 453; Title I, § 102(b) (4), 59 Stat. 559; Apr. 2, 1948, 3:18 p. m., E. S. T., c. 168, Title II, § 202(a), 62 Stat. 113; Aug. 28, 1950, c. 809, Title II, § 208(d) (4), 64 Stat. 544; Sept. 23, 1950, 3:15 p. m., E. D. T., c. 994, Title II, § 221(g), 64 Stat. 945.

26 U. S. C. A. Sec. 294

Additions to the tax in case of nonpayment.

(a) *Tax shown on return.*

(1) *General rule.* Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

(2) *If extension granted.* Where an extension of time for payment of the amount so determined as the tax by the taxpayer, or any installment thereof, has been granted, and the amount the time for payment of which has been extended, and the interest thereon determined under section 295, is not paid in full prior to the expiration of the period of the extension, then, in lieu of the interest provided for in paragraph (1) of this subsection, interest at the rate of 6 per centum per annum shall be collected on such unpaid

amount from the date of the expiration of the period of the extension until it is paid.

(3-5) Omitted. Feb. 25, 1944, 12:49 p. m., E. W. T., c. 63, Title I, §118(a), 58 Stat. 37.

(b) *Deficiency.* Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of jeopardy bond.* If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bond.

(d) *Estimated tax.*

(1) *Failure to file declaration or pay installment of estimated tax.*

(A) *Failure to file declaration.* In the case of a failure to make and file a declaration of estimated tax within the

time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

(B) *Failure to pay installments of estimated tax declared.* Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount

of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.* If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60 (a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year [or in the case of farmers exercising an election under section 60 (a), within the last quarter] in an amount of at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and

credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66⅔ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.

(3) *Tax on self-employment income.* This subsection shall be applied without regard to the tax imposed by subchapter E, relating to tax on self-employment income.

(e) *Substantial Overstatement of Expected Carry-Backs.* If the time for payment of any tax or taxes for any taxable year is extended under section 3779, there shall be added to such tax or taxes an amount equal to 5 per centum of the penalty portion, if any, of the amount to which such extension relates, unless the taxpayer establishes to the

satisfaction of the Commissioner that, as of the end of the taxable year in which such extension was made, there was reasonable cause to expect there would be no such penalty portion. The penalty portion shall be the excess of the amount to which such extension relates which is not paid by the end of the taxable year in which such extension is made over 125 per centum of the amount to which such extension relates which is satisfied by applying thereto a decrease in tax in respect of an application under section 3780(a) less any amounts assessed in respect of such application which are not so satisfied. 53 Stat. 88, amended June 9, 1943, 7 p. m., E. W. T., c. 120, § 5(b), 57 Stat. 144; Feb. 25, 1944, 12:49 p. m., E. W. T., c. 63, Title I, § 118(a), 58 Stat. 37; May 29, 1944, 7 p. m., E. W. T., c. 210, Pt. I, §§ 6(b), (8), 13(b), 58 Stat. 235, 244; July 31, 1945, c. 340, § 4(b), 59 Stat. 523; Aug. 28, 1950, c. 809, Title II, § 208(d) (8), 64 Stat. 545; Jan. 2, 1951, c. 1195, § 2, 64 Stat. 1136; Oct. 20, 1951, 2:07 p. m., E. S. T., Title I, § 103(b), 65 Stat. 465.

APPENDIX B

JUDGMENT

"In The United States District Court for the Northern District of Texas, Dallas Division.

"Civil Action No. 6329

"Dee Brown Walker and Ann G. Walker,
Plaintiffs,

v.

"The United States of America,
Defendant.

"On this the 21st day of May, 1956, the above entitled and numbered cause came on for trial, and came the plaintiffs and the defendant, and announced ready for trial. The Court, having heard the pleadings, evidence, and argument of counsel, and being fully advised in the premises, is of the opinion that the law and the facts are with the defendant and against the plaintiffs and that the plaintiffs should take nothing by their suit; it is, therefore,

"Ordered, Adjudged and Decreed that the plaintiffs, Dee Brown Walker and Ann G. Walker, take nothing by their suit against the defendant, United States of America, and that the costs of this action be and the same are hereby taxed against the plaintiffs.

"To all of which action of the Court plaintiffs except.

"Dated at Dallas, Texas, this the 21st day of May, 1956.

WM. H. ATWELL,
United States District Judge."

"Approved as to Form:

DEE BROWN WALKER,
Attorney for Plaintiffs

JOHN C. FORD,
Assistant United States Attorney
Attorney for Defendant."

Mr. Dee Brown Walker, Dallas, Texas—in persona;

Mr. Thomas H. Foye, Washington, D. C. and Mr. John C. Ford, Dallas, Texas—for the defendant.

"Number 6329, Dee Brown Walker and wife, Ann G. Walker, versus the United States of America is a suit by the plaintiffs against the defendant to recover a penalty which the plaintiffs claim they paid to the tax collector because of not disclosing in an anticipatory return the amount of estimated tax which the plaintiffs thought they would make, or owe, by reason of their receipts during the remainder of the year, 1952.

"I find as facts that the plaintiffs had paid their 1951 taxes on time, but in making that return, they did not disclose an estimation of what they would make during the remainder of the year, 1952, or during the entire year, 1952; that because of that failure, the tax collector of the

defendant assessed a penalty against the plaintiffs for not doing so, and that penalty amounted to the sum of $203.77, which penalty was paid by the plaintiffs, and after having paid that penalty, the plaintiffs filed an application for a refund, and in that application, which the statute requires, they alleged as a reason for the refund that the collection of that penalty was unconstitutional. That reason in the application for refund is attacked by the defendant as insufficient under the statute, that is, because it does not give the respect in which it is unconstitutional.

"As a conclusion of law, I hold, first; That the claim filed by the plaintiffs is sufficient under the statute and the suit may not be dismissed because of the failure to particularize in what respect the collection of that penalty was unconstitutional. I further hold that the payment of the penalty demanded by the collector for not giving the information as to the estimated return for that taxable year was, and is, a proper penalty, and the collector had a right to collect it, and the payment of it was voluntary, and if it had not been paid voluntarily, the collector had a right to seek further relief in its collection, which he found unnecessary.

"I think that the Congress had a right to penalize a taxpayer who does not give the information of estimated tax, because the payment of taxes is essential to the existence of a proper government; and not only that, the collection of a tax that has already been owing may be

greatly assisted by having an estimate from the taxpayers of the nation as to what was expected to be made during that coming term. Therefore, I hold that the judgment will go for the defendant.

WM. H. ATWELL,
United States District Judge.

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16211

DEE BROWN WALKER and ANN G. WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(February 5, 1957.)

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM: The question presented by this appeal is whether the statute[1] providing for additions to tax,

[1] §294(d)(1)(A) of the Internal Revenue Code of 1939:

"In case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax five percentum of each installment due but unpaid, and in addition with respect to each such installment due but unpaid, one percentum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed ten percentum of the unpaid portion of such installment. * * *."

where a taxpayer fails through wilful neglect to make and file a declaration of estimated tax, is constitutional. The additional tax was assessed against appellants and they paid the sum of $203.77, filing claim for refund and subsequently this suit, on the ground that the statute was unconstitutional. The Court below denied recovery and appellants prosecute this appeal. The facts were stipulated,[2] and the Court below, being "of the opinion that the law and the facts are with the defendant and against the plaintiffs," denied recovery. Appellants argue that the additional tax is basically unconstitutional[3] as violative of

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[2]Pertinent portions of the stipulation are the following:

"During the taxable year January 1, 1952 to December 31, 1952 the plaintiffs failed to make a timely declaration of the estimated tax which they would pay for the taxable year 1952 and were assessed by the Internal Revenue Service the sum of $203.77 under the provisions of Title 26, §294(d)(1)(A) U. S. C. A. Plaintiffs failed to make a timely declaration through wilful neglect * * *. The plaintiffs paid such sum of $203.77 * * * [and] filed their claim for refund * * * claiming that the statute upon which the penalty was based was unconstitutional and that the amount was illegally and wrongfully collected from the plaintiffs."

[3]These quotations from appellants' brief epitomize their contentions:

"We think that the Courts have already allowed the executive branch of our government too much power and authority under the Constitution to the damage of the individual citizens * * * [Fifth Amendment quoted in full].

"This particular statute is punitive in nature and its three parts impose three penalties * * * a penalty for not filing an estimate of income tax; * * * a penalty for not paying the estimate * * * and a penalty for underestimating the amount of the tax * * *.

"It is fundamental that the Constitution of the United States divided the Government into three different branches and each was to function independently of the others. Punishment of offenses under the law was placed with the judiciary to the exclusion of the other two branches. The right to trial by jury was preserved, and this right is of great importance to the individual citizens. * * *. The present statute places in the hands of the Internal Revenue Service the power to levy a penalty or fine if the declaration is not made. *It must be remembered that this penalty or fine is not for money owed and not paid, but is one imposed merely because an act is not performed.* Yet the entire proceeding is investigated, heard, and judged by a department of the executive of the Federal Govern-

(Footnote No. 3, Continued on Page 23)

the Fifth Amendment and as offending against the constitutional separation of powers between the executive and judicial departments. They cite no case to sustain their position, but content themselves with a general argument that it is not just and right to permit the Government to assess or to collect, through administrative action, the additional tax provided for. The complaint is leveled entirely against that portion of §294 which provides additions to the tax in event of failure to file the declaration.

The position of the Government in reply may be stated by quoting what we said with reference to its attitude in *Abney, et al. v. Campbell*, 1953, 206 F. 2d 836, 838: "* * * appellee urges upon us: that appellants are but seeking to rethresh old straw; that, however appealing but for those decisions their arguments and contentions might have been, appellants, in putting them forward now, are running a completely covered track; that either expressly or by implication every question raised and every argument put forward by them has been already decided against them; and that we should treat the questions argued, as already foreclosed against them."

We found that position sustained by appellee in that case; and so do we here. Appellants do not attack di-

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(Footnote No. 3, Continued from Page 22)

ment to the exclusion of any jury * * *. The penalty is not for money owed, but for something not done * * *.

"In the various cases passing on the constitutionality of tax statutes such as the one imposing fifty percent for fraud, the Supreme Court of the United States has always looked at the problem from the viewpoint of the Federal Government. But what about the rights of the citizen? He was supposed to be protected in the use of his property and if it was to be taken from him, he should have the right to have a court and jury pass on the question * * *."

rectly the statutory requirement that estimates be filed; and it is difficult to perceive any sound reason why Congress should not have possessed the power to lay this duty upon taxpayers as a reasonable constituent of the mechanics of ascertaining the amount of taxes to be assessed.

The exhaustive opinion of the Supreme Court in *Brushaber v. Union Pacific R.R. Co.*, 1915, 240 U. S. 1,[4] establishes beyond doubt the all-embracing character of the taxing authority possessed by Congress along with a like latitude in selecting modes of exercising that power.[5] Responding to the attack there made,—being not unlike the basis of the attack here,—that the provision of the Act requiring the corporation without compensation to account for and pay at the source taxes claimed, not against the corporation, but against its bondholders, violated the Fifth Amendment, the Court said: "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Con-

[4]Indeed, what was there held was foreshadowed and conceded to be sound law in the older cases of Hylton v. United States, 1796, 3 U. S. 171, and Pollock v. Farmers Loan & Trust Co., 1895, 157 U. S. 429, 158 U. S. 601.

[5]The Court there (p. 20) quoted from the old case of Stockdale v. Insurance Companies, 1873,20 Wallace 323,331:

> "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed * * *."

stitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause * * *." [p. 24.]

The broad discretion given Congress in establishing procedures by which its tax exactions may be made effective was further removed from the realm of doubt by the Supreme Court decision in *Steward Machine Co. v. Davis, Collector*, 1937, 301 U. S. 548.[6] Based upon the teachings of that case and the one decided simultaneously with it, *Helvering, Commissioner v. Davis*, 1937, 301 U. S. 619, this Court approved[7] the provisions of the 1950 amendment to the Federal Insurance Contributions Act requiring employers of domestic help[8] to hold back a percentage of the employee's earnings and, having contributed a like amount, to remit it to the Collector of Internal Revenue. And we have also upheld against constitutional attack the "tax on self-employment income"[9] in *Cain v. United States*, 1954, 211 F. 2d 375, cert. den. 347 U. S. 1013. And we

[6]This decision blazed a trail along which, step by step, those charged with collecting the vast revenues required for the running of the Government have fashioned the mechanics of which the procedure here attacked is a part. The position of these appellants may be well stated by quoting from the prophetic words of one of the closing paragraphs of Mr. Justice McReynolds' opinion dissenting for four members of the Court (301 U. S. 609): "No defense is offered for the legislation under review upon the basis of emergency. The hypothesis is that hereafter it will continuously benefit unemployed members of a class. Forever, so far as we can see, the states are expected to function under federal direction concerning an internal matter. By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the states will retain genuine independence of action. And without independent states a federal union as contemplated by the Constitution becomes impossible."

[7]Abney v. Campbell, 1953, 206 F. 2d 836, cert. den. 346 U. S. 924.

[8]26 U. S. C. A. §1400, 1432.

[9]26 U. S. C. A. §480, 481, 482.

assumed to be valid the penalty provisions here under attack in our decision of *Stephan, et ux. v. Commissioner*, 1952, 197 F. 2d 712.

The case of *Helvering, Commissioner v. Mitchell*,[10] is a complete answer to the argument that additional taxes by way of civil penalties or sanctions may not be imposed administratively. There, the Court held that the statutory imposition of a fraud penalty[11] was entirely civil in nature and collection thereof was not affected by a judgment of acquittal in a criminal offense involving the same acts. That Congress provided a distinctly civil procedure for the collection of the additional fifty percentum indicates clearly that it intended a civil, not a criminal, sanction. * * * Thus the determination of the facts upon which liability is based may be by any administrative agency instead of a jury, * * *." [p. 402.]

Being of the opinion that the questions raised by appellants have, by these cases, been decided against them, the judgment of the Court below is

AFFIRMED.

[10]1938, 303 U. S. 391.
[11]§293(b) of the Revenue Act of 1928.

A True Copy:
Teste:

/s/ Edward W. Wadsworth
Clerk of the United States Court of Appeals for the Fifth Circuit.

(SEAL)

JUDGMENT.

Extract from the Minutes of February 5, 1957.

DEE BROWN WALKER and ANN G. WALKER,

v.

UNITED STATES OF AMERICA.

No. 16211.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1033

DEE BROWN WALKER AND ANN G. WALKER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 18–20) is not officially reported. The opinion of the Court of Appeals (Pet. 21–26) is reported at 240 F. 2d 601.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957 (Pet. 27), and rehearing was denied on March 9, 1957 (R. 41). The petition for a writ of certiorari was filed May 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 294 (d) (1) (A) of the Internal Revenue Code of 1939 is unconstitutional in providing for additions to tax for the failure, due to willful neglect, to make and file a declaration of estimated tax.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1939:

> SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.
>
> (a) *Tax Shown on Return.*—
>
> * * * * *
>
> (d) [as added by Sec. 118 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and amended by Sec. 13 (b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Estimated Tax.*—
>
> (1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to file declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

* * * * *

(26 U. S. C. 1952 ed., 294.)

STATEMENT

The facts are as follows:

Through willful neglect, taxpayers, husband and wife, failed to make a timely declaration of their estimated tax for the calendar year 1952. (R. 12–13.) Because of such failure, the Commissioner assessed them with additional tax in the amount of $203.77, pursuant to Section 294 (d) (1) (A) of the Internal Revenue Code of 1939. (R. 12–13.) Taxpayers paid the $203.77 and, after filing a claim for refund thereof

(R. 13), instituted suit for refund (R. 1–4) solely on the ground that "the statute upon which the penalty was collected is unconstitutional" (R. 3).

The District Court and Court of Appeals both denied recovery, entering judgment for the United States. (Pet. 17–27.)

ARGUMENT

As grounds for granting the writ (Pet. 4–6), taxpayers assert that the question presented is one which has not been passed upon by this Court and that the decision below is contrary to *Helvering* v. *Mitchell*, 303 U. S. 391. However, the alleged conflict is nonexistent and the question presented is not one requiring further review by this Court.

1. As the court below indicated (Pet. 23, 26), prior decisions of this Court sufficiently refute taxpayers' argument that Section 294 (d) (1) (A) of the 1939 Code, *supra*, pp. 2–3, is unconstitutional.[1] Section 58 (26 U. S. C. 1952 ed., 58), which requires the filing of a declaration of estimated tax in certain prescribed circumstances, is part of the Congressional plan to

[1] In their complaint (R. 3) and brief in the court below, taxpayers attacked as unconstitutional only Section 294 (d) (1) (A), the section which provides for additions to tax for willfully neglecting to make and file a declaration of estimated tax. Taxpayers now refer to "two statutes" as being involved (Pet. 4), the other one apparently being Section 58 (26 U. S. C. 1952 ed., 58), which requires the filing of a declaration of estimated tax and was first referred to by the taxpayers in their petition for rehearing below. The decision below covers both statutes although the court stated (Pet. 23–24) that taxpayers did not directly attack the statutory requirement that estimates be filed.

put taxpayers on a pay-as-you-go basis; it was intended to supplement the withholding provisions of the Code by requiring current payment of tax on that income on which the tax could not, as a practical matter, be subjected to withholding at the source. See H. Rep. No. 401, 78th Cong., 1st Sess., pp. 11–13, 32–39 (1943 Cum. Bull. 1283, 1290–1291, 1307–1312); S. Rep. No. 221, 78th Cong., 1st Sess., pp. 8–10, 35–43 (1943 Cum. Bull. 1314, 1319–1321, 1340–1346); H. Conference Rep. No. 510, 78th Cong., 1st Sess., pp. 49–59 (1943 Cum. Bull. 1351, 1367–1374). The holding that the provision for the withholding of tax at source is constitutional as a proper exercise of the taxing power (*Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1) strongly supports the constitutionality of the requirement for the filing of a declaration of estimated tax. Congress has broad discretion in establishing procedures by which its tax exactions may be made effective (*Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619) and that discretion extends to the imposition of additional taxes by way of a civil sanction, as under Section 294 (d) (1) (A), and to permitting such civil sanction to be imposed on the basis of facts determined by an administrative agency (*Helvering* v. *Mitchell*, 303 U. S. 391). Thus, there is no substantial question as to the constitutionality of Section 294 (d) (1) (A). See *Stephan* v. *Commissioner*, 197 F. 2d 712 (C. A. 5th), and *Coates* v. *Commissioner*, 234 F. 2d 459 (C. A. 8th), where the constitutionality of Section 294 (d) was assumed, and compare *Porth* v. *Brodrick*, 214 F. 2d 925 (C. A. 10th); *Abney* v. *Campbell*, 206 F. 2d

836 (C. A. 5th), certiorari denied, 346 U. S. 924; *Cain* v. *United States,* 211 F. 2d 375 (C. A. 5th), certiorari denied, 347 U. S. 1013; *Kellems* v. *United States,* 97 F. Supp. 681 (D. Conn.).

2. Taxpayers do not even attempt to show wherein the decision below is contrary to *Helvering* v. *Mitchell, supra.* Their argument in support of the asserted conflict (Pet. 6) is simply that the *Mitchell* case is distinguishable. Insofar as *Mitchell* has any application, it supports the decision below since it upholds the validity of an assessment of an additional tax as a civil penalty.

CONCLUSION

The decision below is correct and involves no important question or conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
MELVA M. GRANEY,
Attorneys.

JUNE 1957.

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